Supreme Court, U. S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-320.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

THOMAS F. COSTELLO,
PETITIONER,

v.

BOARD OF APPEALS OF THE
TOWN OF CONCORD,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPEALS COURT OF MASSACHUSETTS.

Brief for the Respondent in Opposition.

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Opinions Below.

The opinions below are set forth in the Petition Appendix in chronological order (Petition 12a-28a).

Question Presented.

Is there an unconstitutional taking when state courts uphold a town zoning board's refusal to issue a special permit to place landfill in a flood plain because the board finds, and a trial court affirms after a *de novo* hearing, that the land is subject to flooding and that the proposed landfill would increase flood hazards and pollution?

Lack of Jurisdiction.

The court lacks jurisdiction because this is a moot case. The case concerns a former landowner, the trustee(s) of the S. Kemble Fischer Realty Trust ("the Trust"), which sought to compel a zoning board to issue a special permit allowing landfill to be placed in a flood plain zone. The Trust sold the land in January, 1978, and there is no longer a case or controversy, as required by Article III of the United States Constitution, because a special permit could no longer be issued to the Trust. *Sibron v. New York,* 392 U.S. 40, 57 (1968); *Liner v. Jafco., Inc.,* 375 U.S. 301, 306 n.3 (1964). See *Brownlow v. Schwartz,* 261 U.S. 216 (1923); *Heitmuller v. Stokes,* 256 U.S. 359 (1921). This jurisdictional consideration of mootness is fully argued as the first point below in Respondent's Reasons to Deny Certiorari.

Constitutional Provisions and Zoning By-law Involved.

The Petition sets out the zoning by-law provisions defining the purposes of the flood plain zone and the uses permitted in that zone (Petition 8a-11a). Respondent, the Concord Board of Appeals ("the zoning board") notes that the section of the town by-law which defines the flood plain zone, also relevant, is reproduced in the trial court's opinion (Petition 20a, Ruling 10).

The Petition sets out portions of the Fifth and Fourteenth Amendments to the United States Constitution. The equal protection clause is erroneously included; equal protection questions were neither raised below nor considered by the state courts and therefore cannot be raised here. *Wilson v. Cook,* 327 U.S. 474, 482-84 (1946); *Whitney v. California,* 274 U.S. 357, 362-3 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-99 (1899).

Statement of the Case.

A. *The Zoning By-Law Provisions.*

This case involves the exercise by a town of its power to zone land for uses appropriate to the character of the land and for uses designed to preserve the health, safety and welfare of the town's inhabitants. The zoning by-law of the town of Concord, Massachusetts provides for a flood plain zone and an administrative procedure to exempt from the flood plain restrictions land not subject to flooding or otherwise not unsuitable for exception from the limitations on uses in the flood plain.

Land fill is absolutely prohibited except as allowed by special permit after a public hearing to determine that the proposed use will not interfere with the purposes of the flood plain zone or the public health, safety and welfare.

The stated central purpose of the flood plain zone is to protect against flood hazards. Other purposes include protection of the ground water table and avoidance of the social costs of unsuitable development in marshes, along water courses or in floodprone areas (Petition 9a, By-law Paragraph A). Damming or relocation of a water course is prohibited except as part of an over-all drainage basin plan (Petition 9a & 10a, By-Law Paragraphs B(6)(c) & B(7)). The principal use limitations imposed in the flood plain zone are the prohibition of structures and the limitation of land uses to conservation, recreation, farming, drainage, forestry or utility purposes which do not involve filling (Petition 8a-9a, By-law Paragraph B).

The by-law contains two separate special permit provisions, one to allow structures accessory to permitted uses if appropriately designed for exposure to flooding (Petition 8a-9a, By-law Paragraph B(6)), the other to allow exemption of the land if it is shown not to be subject to flooding or "not unsuit-

able because of drainage conditions" for non-flood plain uses, and the exemption would not conflict with the purposes of flood plain zoning (Petition 10a, Paragraph B(7)). Only in connection with exemption of the land from flood plain controls may a special permit to fill flood plain land be issued (Petition 10a).

B. *The Trust's Special Permit Application.*

The Trust owned five lots of land along the Assabet River in Concord (Petition 13a - 14a, Finding 1). Portions of three of them lay in the Concord flood plain zone (Petition 4a).

In April of 1974 the Trust applied to the Concord Board of Appeals for a permit to fill low-lying portions of the three lots so as to raise the low portions above the defined elevation of the flood plain control zone (Petition 4a & 14a, Finding 5). The lots to be partially filled totalled about 2.6 acres (Petition 13a & 14a, Finding 1) and the Trust stated it sought to place about 9300 cubic yards of fill in the flood plain zone (Petition 5a). The permit sought was to fill one end of a dam by-pass canal[1] and to fill such portions of the Trust's land as lay in the flood plain zone (Petition 14a, Finding 5).

After a hearing and the receipt of advice, as required by state law, from the Planning Board and the Board of Health, the Board of Appeals denied the permit application (Petition 4a & 15a, Findings 6 - 7, 9 - 11). With respect to two of the lots, the Board denied the permit because it found the proposed fill would interfere with flood control (Petition 6a - 7a). The permit to fill a canal on the third lot was denied for both flood control and pollution reasons (Petition 7a).

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[1] The other end of the canal was owned by an abutter. (Petition 14a, Findings 1 & 2).

In January of 1975, the Trust filed a complaint in Massachusetts Superior Court seeking to compel the zoning board to issue a special permit to allow the Trust to place the proposed landfill in the flood plain zone (Petition 13a). In essence, the complaint was for a writ of mandamus.[2]

After a trial *de novo* (Petition 19a, Finding 5), the trial judge found that by filling land subject to flooding, the Trust would dam or change a water course without an overall drainage basin plan, would contribute to erosion of the existing dam, would increase the hazard of flooding in the Assabet River System, would contribute to pollution, and would adversely affect the land of others (Petition 17a-18a, Findings 19-22, 24-25).

The trial court held, among other things, that the Trust had not carried its burden of proof before the zoning board and that the permit application had been validly denied in the exercise of the police power (Petition 20a - 21a, Rulings 9 & 15). The Appeals Court of Massachusetts affirmed (Petition 22a-27a), and the Supreme Judicial Court of Massachusetts denied further appellate review (Petition 28a).[3]

The Trust sold its land on or about January 2, 1978 and on January 3, 1979 recorded deeds to all of the five lots, including the areas which it had applied to fill. (Middlesex County Registry of Deeds Bk. 13618, pp. 575, 576, 577, copies of which have been lodged with the Clerk's Office of this court.)

The Appeals Court upheld the trial court and upheld the constitutionality, as police power regulation, of the flood

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[2] The Trust sued the town zoning board to change its decision; it did not sue the town for damages from an alleged taking.

[3] One of Petitioner's less important misstatements is his specification of "the basis" of the Trust's application to the Supreme Judicial Court for further appellate review (Petition 7). The application is a short-form document which contains no specification of issues nor any legal argument.

plain control zoning limitations on use of land as applied by denying the Trust's special permit application. The Appeals Court concluded plaintiff's land had not been rendered worthless by the denial of the permit and that it was consistent with the record that there might be uses for the land in the flood plain zone which did not require fill (Petition 26a).

Thomas F. Costello now petitions for review of the Massachusetts decisions that the Trust not be allowed to place fill in the flood plain zone, asserting that those decisions effected an unconstitutional taking without just compensation.

The Petitioner does not contest the validity of the flood plain zoning (Petition 10), but only the law as applied by denial of a special permit to fill.

The Petitioner's Statement of the Case states as facts certain assertions which either are entirely lacking a basis in the record or were expressly or impliedly rejected in the trial court and which the Appeals Court ruled the trial court was warranted in rejecting. For example, the trial court made no findings about the nature or content of the evidence presented to the Board by the Trust. *Compare* Petition 3 *with* 15a, Findings 6 & 7. The trial court made no findings on how fill would change any use possibilities for the portions of the 2.6 acres which the Trust proposed to fill. Nor did the trial court find that lack of fill was the reason the Trust could not use its land for access, general recreation or other uses permitted in the flood plain.

The Petitioner's assertion that he is or was "the sole legal and beneficial owner" of the Trust (Petition 1 & 3), is entirely without a basis in the record. At the time of the permit application, the trial court found Petitioner was not yet a co-trustee of the Trust (Petition 14a-15a, Findings 4-8) and the

record does not disclose who are or were the beneficiaries of the Trust.[4]

Petitioner's assertions (Petition 11, n.11) about the physical characteristics of the land have no basis in the record. *See* Petition 12a-21a.

Most importantly, the Petitioner neglects to disclose to this Court (and neglected to disclose to the Appeals Court below) that the Trust sold its land in 1978, thus mooting questions whether issuance of a special permit to fill the Trust's land was constitutionally required.

Reasons for Denying Certiorari.

1. THE CASE IS MOOT BECAUSE THE TRUST SOLD THE LAND IN 1978; THEREFORE THIS COURT LACKS JURISDICTION.

Unless there is an existing case or controversy, this court lacks judicial power to decide a merely abstract legal question. U.S. Constn., Article III, Sections 1 & 2. *Sibron v. New York,* 392 U.S. 40, 57 (1968); *Liner v. Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964).

Petitioner's claims of a taking without just compensation are based on the denial of a special permit by a state zoning board, confirmed by state courts. Petitioner fails to mention that record title to the land passed on January 3, 1978 from the S. Kemble Fischer Realty Trust to Millsquare Associates. See copies of the record deeds which have been lodged with the Clerk's Office.[5] A reversal of the zoning decision and a

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[4] This court cannot receive evidence not in the record below. *Nashville, Chattanooga & St. Louis Railway v. Browning,* 310 U.S. 362, 367 (1940).

[5] The general rule is that this court cannot receive evidence not part of the record below. *Nashville, Chattanooga & St. Louis Railway v. Browning,* 310 U.S. 362, 367 (1940). Mootness contentions

grant of the permit to the Trust would be wholly ineffectual because the Trust no longer owns the property. A sale of real estate moots questions concerning validity of denials of zoning permits for that real estate. *Brownlow v. Schwartz,* 261 U.S. 216 (1923); *Heitmuller v. Stokes,* 256 U.S. 359 (1921).

Any possibility of recurrence of government action similar to that in this case is merely speculative, and petitioner lacks a personal stake even in that speculative possibility. For both reasons, this case now presents no possible subject for judicial action. *Oil Workers Local 8-6 v. Missouri,* 361 U.S. 363, 368-9 (1960); *Commercial Cable Co. v. Burleson,* 250 U.S. 360 (1919). See Note, *Mootness on Appeal in the Supreme Court,* 83 Harv. L. Rev. 1672, 1683-4 (1970).

The Trust brought the suit below only on its own behalf and not as the representative of any class. The relief it sought was issuance of a special permit. The Trust has now sold its land and will never again apply for the same special permit to place landfill in the same canal and other low areas, so the question is not capable of repetition so far as the Trust is concerned. There is little prospect a similar conflict will arise and yet evade review. The case is therefore moot. *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

Each application which seeks to have land excepted from a comprehensive zoning plan involves a unique set of facts and

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are an exception to the general rule. The facts showing mootness may always be raised, even for the first time, at the Supreme Court level. R. Stern & E. Gressman, *Supreme Court Practice,* § 18.1 (1978); see also *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975); *Roe v. Wade,* 410 U.S. 113, 125 (1973); *SEC v. Medical Committee for Human Rights,* 404 U.S. 403 (1972). The reason for the rule is that the facts which give rise to problems of mootness always occur after the record below has been closed.

The question of mootness is a question of federal law for this Court. *Liner v. Jafco, Inc.,* 375 U.S. 301, 304 (1964).

circumstances and must be considered on that basis. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

Further deliberation on this moot case will not aid in deciding those future cases.

2. PETITIONER LACKS STANDING TO SEEK A WRIT OF CERTIORARI.

Petitioner is Thomas F. Costello, individually.[6] The S. Kemble Fischer Realty Trust formerly owned the property for which a special permit was sought. While it appears of record that Thomas F. Costello became sole trustee of the Trust on August 26, 1977 (Petition 15a, Finding 8), it nowhere appears of record in this case (despite petitioner's assertion, Petition 3) who the beneficiaries of the Trust are or were.[7]

Petitioner, Thomas F. Costello, was not a person aggrieved by the trial court's decision to affirm the denial of a permit for land owned by a trust for which he was a fiduciary. The Trust was the aggrieved party. Nor is he a person aggrieved by the Appeals Court decision, which held that no taking had been effected by the Concord zoning decision to prevent fill

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[6] The Petition was originally filed with a cover which designated "S. Kemble Fischer Trust, Thomas F. Costello, Trustee" but a corrected version of the Petition was filed by and in the name of "Thomas F. Costello, Petitioner" and the cover of the corrected Petition shows "Thomas F. Costello, Petitioner." The printer's cover letter for the corrected Petition (cc to Thomas F. Costello) stated "We have corrected typographical errors on the cover, and changed incorrect appendix references. You may destroy the incorrect petitions."

If the Trust no longer exists or has been terminated (facts not apparent from the record and not known to Respondent but suggested by the correction of the Petition), this case would be moot for the additional reason that the party aggrieved below no longer exists.

[7] See n.4 above.

on the same land. At the time of the Appeals Court decision on March 28, 1980, the Trust had not owned the land for more than a year. Neither Petitioner nor the Trust were aggrieved by that decision.

Petitioner has failed to make the requisite showing that enforcement of the Appeals Court judgment would deprive Petitioner himself of constitutional rights. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Assn.*, 276 U.S. 71 (1928). See also *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891).

Petitioner lacks the personal stake in the outcome of any further consideration of the merits of the Appeals Court decision which is necessary to confer standing to appeal. *Barry v. District of Columbia Board of Elections*, 580 F. 2d 695, 696 (1978); Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3902 (1976). See also *Deposit Guaranty Natl. Bank v. Roper*, __ U.S. __, 100 S. Ct. 1166, __, 63 L. Ed. 2d 427, 443, 445-6 (Powell & Stewart, JJ., dissenting) (March 19, 1980).

3. THE PETITION PRESENTS NO QUESTIONS WORTHY OF REVIEW BY THIS COURT.

The grant of certiorari is discretionary, Sup. Ct. R. 17; *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U.S. 162 (1917), and should only be accorded when the case presents questions which are of sufficient general importance to warrant review by the nation's highest court. *Brown v. Allen*, 344 U.S. 443 (1952).

No one other than the Petitioner would be affected by further review of the decision below.[8] The facts are too narrow

[8] And, as shown in headings 1 and 2 of Respondent's argument herein (concerning the mootness of the case and Petitioner's lack of standing to seek certiorari), not even the Petitioner would be affected.

to justify Supreme Court consideration. The constitutional question below was whether the denial of a particular permit application concerning a unique riverbank site was, on the basis of facts found by the trial court, a valid exercise of the police power. The general validity of flood plain zoning is not challenged. Petition 10.

"The jurisdiction [of the Supreme Court to review cases by writ of certiorari] was given . . . to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party . . . another hearing." *Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923). No pattern or instance of discriminatory regulation is suggested by the Petition.

The Massachusetts courts have proved themselves capable of distinguishing between such severe restrictions of property as constitute a compensable taking and regulatory acts, such as this one, which merely restrain property owners from harming the public welfare. Compare *MacGibbon v. Board of Appeals of Duxbury,* 369 Mass. 512, 340 N.E. 2d 487 (1976) with *Turnpike Realty Co. v. Town of Dedham,* 362 Mass. 221, 248 N.E. 2d 891 (1972), *cert. denied,* 409 U.S. 1108 (1973).

4. THE COURTS BELOW CORRECTLY DECIDED THAT THE CONCORD FLOOD PLAIN ZONING BY-LAW IS CONSTITUTIONAL AS APPLIED TO THE TRUST'S LAND.

a. *Certiorari was denied in a similar case and should be denied here.*

A Massachusetts flood plain zoning by-law with terms virtually identical to the Concord by-law was held constitutional by Massachusetts courts and this court denied a petition seeking certiorari in *Turnpike Realty Co. v. Dedham,* 362

Mass. 221, 248 N.E. 2d 891 (1972), *cert. denied,* 409 U.S. 1108 (1973). The *Turnpike* case presented a stronger "taking" argument than does this case in that two knolls higher than the surrounding flood plain had been designated as part of the flood plain zone. Here, only portions of three of five lots, the low-lying portions, were included in the flood plain zone. Those portions are subject to flooding and actually include a canal which acts as a dam by-pass (Petition 14a-15a, Findings 3 & 5). Unlike the *Turnpike* petitioner, the Petitioner here concedes that Concord's flood plain zoning is validly enacted and does not question the constitutional propriety of the flood plain zoning (Petition 10).

Petitioner argues a constitutional right to be excepted from valid zoning, in order to enhance the value of land by filling it so as to raise its elevation above the elevation of the flood plain. To elevate the land in this manner would increase flood hazards in the Assabet River System (Petition 18a, Finding 24; Petition 24a - 25a, heading 2). No constitutional right to profit at the expense of public welfare exists; even a substantial diminution in value of property caused by zoning does not in itself constitute a taking. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 131 (1978); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (75% diminution); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) (87½% diminution).

The Petitioner makes much of a trial court finding that the Trust "did show that it could not use its land as it is now for access, general recreation or other uses permitted" in the flood plain zone (Petition 18a, Finding 27). The record does not, however, show that the denial of the permit resulted in limiting the uses of the land; the record suggests rather that it is the character of the land, not the denial of the permit, which limits its uses. Nor does the finding, if read closely,

state that "all" or "every" permitted use is foreclosed.[9] It is apparent when this finding is read in conjunction with the court's determination that "the denial of the permit does not render [the Trust's] land worthless" (Petition 21a, Ruling 15) that the court means "some" not "all."

The Appeals Court drew this conclusion when it said:

> The judge also found (although he called it a ruling of law) that the plaintiff's land was not worthless, which we read as a determination that the locus was not without residual economic utility. It is by no means clear from the record that the plaintiff could not use that portion of its land in the flood plain zone for some purpose which did not require filling, for example to enhance that portion of its land which is outside the flood plain.

(Petition 26a).

Even assuming that no direct use were made of the flood plain portions, it is consistent with the record that those areas might have a value as providing setbacks or a river view for uses on the portions of the Trust's land above the flood plain. It is to be presumed that the state's decisions are constitutionally regular, and the exercise of the police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 596 (1962), citing *Salsburg v. Maryland,* 346 U.S. 545, 553 (1954) and *United States v. Carolene Products Co.,* 304 U.S. 144, 154 (1938).

b. *Denial of the Trust's permit application was not a taking.*

No matter which test of a taking is applied to the facts of this case, it is apparent there was no taking. No physical invasion of Petitioner's land resulted from denial of the permit, *cf.*

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[9] The trial judge's finding might be translated to the logical sentence "The land cannot be used for x, y or some z." The term which the trial court used, "other uses," is an indefinite quantifier, not a comprehensive one.

Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); and even certain physical invasions do not amount to takings, *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of cedar trees producing rust harmful to apple trees). Governmental action which precludes uses having "spillover" effects on existing public interests does not require compensation. See Sax, *Takings, Private Property and Public Rights*, 81 Yale L. J. 149 (1971); Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964). The courts have generally recognized as a basis for flood plain zoning the externalities which can be imposed on the community by development in the flood plain, *e.g., Vartelas v. Water Resources Commissioner*, 146 Conn. 650, 153 A. 2d 822 (1959).

Other tests of a taking would also fail here. Petitioner alleges no deprivation of existing uses, see *Goldblatt v. Town of Hampstead*, 369 U.S. 590 (1962) (ordinance preventing continuance of existing gravel mining user held to be valid exercise of the police power); see also *Sibson v. State*, 115 N.H. 124, __, 336 A. 2d 239, 243 (1975). Diminution of value was not proven below (Petition 12a-21a) and is not sufficient in itself to constitute a taking unless the entire interest of the aggrieved party is destroyed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The courts below balanced public interest against private harm as suggested by Justice Holmes in the *Pennsylvania Coal* case, 260 U.S. at 413-14, and found that the palpable public harm of this proposed landfill outweighed private harm, to the extent any private harm was demonstrated (Petition 21a, Ruling 15, and Petition 26a-27a).

If subjected to the tests of utility and fairness, see Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967), it is apparent that the burden of restricted development in the flood plain is shared by all river property owners and generally benefits all of them (Petition

17a - 18a, Findings 19 - 24). The denial of this particular permit application was not a taking under any of the tests courts have applied or commentators have proposed. See generally *Developments in the Law — Zoning,* 91 Harv. L. Rev. 1427, 1462 - 86 (1978).

c. *The decision below accords generally with this court's decisions and with authority that restrictions on development in river flood plains are valid under the police power.*

One public purpose of zoning laws is to suppress land uses which have the character of nuisances. In these instances the courts are generally willing to allow very strict regulation, subscribing to the view that there is no property in a nuisance. See *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387-8 (1926).

This court has upheld as valid exercises of the police power zoning regulations which substantially advance such legitimate governmental goals as protecting open space areas, *Agins* v. *Tiburon,* __ U.S. __, 48 U.S. L. W. 4700, 4701 (June 10, 1980); encouraging preservation of privately-owned historic landmarks, *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978); and protecting the seclusion, quiet, clean air and low traffic conducive to family living, *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974). Land use regulation may address a wide range of values including aesthetic and spiritual ones. *Berman v. Parker,* 348 U.S. 26, 33 (1954). However, the zoning limitation on flood plain development which Petitioner seeks to challenge lies squarely within the traditional bounds of the police power as the community's means of protecting public health, safety and welfare against such direct hazards as flooding, pollution and the attendant public costs. Zoning regulation of river flood areas is for the public purpose of preventing development which amounts to private profit at the public expense,

see *Goldblatt v. Hempstead,* 369 U.S. 590 (1962) and *Mugler v. Kansas,* 123 U.S. 623, 668-69 (1887), by putting in the way of floods material which can wash downstream, clog channels, and destroy other public and private property. See *Vartelas v. Water Resources Commissioner,* 146 Conn. 650, 153 A. 2d 822 (1959). See generally F. Bosselman, D. Callies & J. Banta, *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control,* Part III (1973).

Urban floods are a problem because man has altered the urban environment to tamper with the ecological mechanisms which absorb heavy rains and delay runoff into waterways; the federal government has therefore acted by tying federal flood insurance to requirements that localities adopt flood control zoning similar to the by-law involved in this case. National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001 - 4128 (1970 & Supp. V. 1975). Human activity must be strictly limited in critical areas including fragile lands (alluvial and littoral plains where uncontrolled development could lead to irreversible damage to natural ecological systems) and natural hazard lands, such as flood plains. S.268, 93d Cong., 1st Sess., § 601(i), 119 Cong. Rec. 20, 639 (1973); *Developments in the Law — Zoning,* 91 Harv. L. Rev. 1427, 1592-97 (1978). See also Dunham, *Flood Control Via the Police Power,* 107 U. Pa. L. Rev. 1098 (1959).

5. THE RECORD IN THIS CASE IS INADEQUATE TO PRESENT THE QUESTION OF A TAKING.

Some of the "facts" alleged by Petitioner are not part of the record.[10] The record is a poor one on which to consider a

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[10] *E.g.,* that the existing contours of the land result from prior excavation (Petition, p. 11, n.11). This assertion and the remainder of that footnote is entirely unsubstantiated by the record and are allegations first made, and improperly so, in the petition for certiorari.

decision concerning what flood plain restrictions might constitute a taking.

From the record it is apparent only that some portions of three of five lots are subject to restriction and that a particular zoning permit application filed by the Trust to place fill in the flood plain was denied. It is not clear how large the land areas to be filled were in comparison to the property as a whole, nor are there findings or evidence in the record[11] concerning the value of the property before or after the denial of the special permit, nor are there descriptive findings on the nature of the property or the uses to which it has been or could be put. In the absence of such evidence, it is to be presumed that the permit denial effects no constitutional taking. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

One of the deficiencies of the Trust's original permit application was its failure to include any specific allegations of the use the Trust expected to make of the property if filled; the Trust only alluded to unspecified recreational uses and use for "access" (Petition 6a & 16a, Finding 15). This hampered the Board in applying the balancing test of the by-law and virtually forced its conclusion that the public interest in flood control outweighed any demonstration by the Trust that placing fill in the flood plain was necessary in order to preserve its constitutional rights. A determination of the utility a site possesses is necessary before determination of a taking can be made.

Petitioner has made no showing that denial of the particular permit application permanently restricts its land, or that a permit application which adequately took account of drainage and flooding considerations would not succeed. Absent such a showing, the denial of this permit application can-

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[11] The Trust chose not to include the trial transcript in the record on appeal to the Appeals Court of Massachusetts.

not constitute a taking. *Brecciaroli v. Connecticut Commissioner of Environmental Protection,* 168 Conn. 349, 357-58, 362 A. 2d 948, 952-3 (1975); *Sands Point Harbor, Inc. v. Sullivan,* 136 N.J. Super. 436, 441, 346 A. 2d 612, 614 (1975). See *Agins v. Tiburon,* __ U.S. __, 48 U.S. L. W. 4700, 4702 (June 10, 1980).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

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